1988

State of Utah v. Lane C. Stromberg : Brief of Appellant

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Respondent,

vs.

LANE C. STROMBERG,

Appellant.

Case No. [redacted]061
Priority [redacted]

APPELLANT'S BRIEF

Appeal from final judgment and sentence of the Second Judicial District Court in and for Weber County, State of Utah, Honorable Rodney Page, Judge, Presiding

Thom D. [redacted]
ROBERTS & [redacted]
10 West [redacted]
Salt Lake [redacted]

ATTORNEY FOR DEFENDANT

PAUL VAN DAM
Attorney General
236 State CApitol Building
Salt Lake City, Utah 84114

ATTORNEY FOR PLAINTIFF-RESPONDENT

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	
	)	
	)	
LANE C. STROMBERG,	)	
	)	
	)	
Appellant.	)	Case No.. 880618 CA

APPELLANT'S BRIEF

Appeal from final judgment and sentence of the Second Judicial District Court in and for Weber County, State of Utah, Honorable Rodney Page, Judge, Presiding

Thom D. Roberts No. 2773
ROBERTS & ROBERTS
10 West 300 South Suite 500
Salt Lake City, Utah 84101

ATTORNEY FOR DEFENDANT-APPELLANT

PAUL VAN DAM
Attorney General
236 State CApitol Building
Salt Lake City, Utah 84114

ATTORNEY FOR PLAINTIFF-RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a final judgment and sentence of the Court below for a third degree felony crime, possession of one ounce of marijuana. Jurisdiction of this Court is therefore conferred by Rule 26, Utah Rules of Criminal Procedure, and Section 78-2a-3(2)(e), Utah Code Annotated, 1953, as amended.

STATEMENTS OF ISSUES PRESENTED FOR REVIEW

POINT I: THE EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE

POINT II: THAT THE CONVICTION OF THE DEFENDANT FOR FELONY POSSESSION OF MARIJUANA IS AN UNREASONABLE AND UNCONSTITUTIONAL DEFINITION OF A CRIME

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1. Fourth Amendment, United States Constitution
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Respondent, vs. LANE C. STOMBERG, Appellant.	)	Case No. 880618 CA

APPELLANT'S BRIEF

STATEMENT OF THE CASE

The defendant was charged by way of Information with two drug offenses and two offenses involving tax stamps. After a jury trial, defendant was convicted of possession of a controlled substance, to-wit: marijuana, a third degree felony.

Chief Gardner of the Syracuse Police Department met with a fifteen year old female in connection with an investigation in the beginning of April, 1988. At that first meeting, there was no mention made of any drugs. (See reporter's transcript of defendant's motion to suppress evidence, page 10, 12 and 14, hereinafter referred to as Tr. Ms.) The fifteen year old informant, Tessie Heber, indicated to Chief Gardner in a subsequent interview that she had seen marijuana pipes in the home

of the defendant (Tr. Ms. p. 18) and that she had seen the defendant smoke marijuana three to four times, but that she had never seen him smoking marijuana in the house. (Tr. Ms. p. 20) The testimony was that she had seen the pipes in three locations one and one half years previous to the interview. (Tr. Ms. p. 27) The last time that she had been in the house, was the first week in March, 1988. Further, she told the officer that she had never seen drugs in the house. (Tr. Ms. p. 25)

Chief Gardner put all of the information provided by Ms. Heber into the affidavit for the search warrant. (Tr. Ms. p. 52) Chief Gardner did not check the credibility of Ms. Heber although he was aware that she was seeing a psychiatrists for stress as well group therapy at school. (Tr. Ms. p. 54-5) Further, Ms. Heber had never experienced marijuana, (Tr. Ms. p. 22) nor her ability to identify marijuana pipes as opposed to other pipes.

Both Chief Gardner and Lon Brian, Davis County Sheriff, Metro -Narc Task Force, felt that the information from Ms. Heber was not sufficient to justify a search warrant.(Tr. Ms. p. 30 and 89) Further, the statements attributed to Brian in paragraphs five and six of the affidavit, (Record p. 7) were made months prior to the signing of the affidavit and issuance of the warrant. (Tr. Ms. p. 122)

Further surveillance conducted on the defendant's home (see e.g. Tr. Ms. p. 34) just prior to the issuance of

the warrant, cars belonging to certain known drug distributors were seen parked near the defendant's home, although this information as not presented to the magistrate. (Tr. Ms. p 45.) The timing and purpose for the search was a concern for new drugs, (Tr. Ms. p.46.) and to search for other drugs while in the house, not just marijuana pipes. (Tr. Ms. p 48-9.)

At the motion to suppress, Mr. Mark Andrus, Davis County Attorney's Office, testified with regard to the preparation and purpose of the search warrant and search. In connection with the preparation of the affidavit that they intentionally took an expansive reading of the statements by Ms. Heber to authorize a broader search. As noted, controlled substance was used, rather than just "marijuana", which was what was told to the authorities by Ms. Heber. (see e.g. Tr. Ms. p. 77) The purpose of the search warrant was to be able to search for any controlled substances and any paraphernalia, not just marijuana nor marijuana pipes. (see e.g. Record p. 85) Further, the drugs that were being sought were not the same drugs that had previously been there, but it was hoped that new drugs would be available and on the premises. (see e.g. Tr. Ms. p. 189.) Further, Mr. Andrus knew that they did not have information that the defendant was drug dealer, but they hoped to be able to develop some information later and get a second search warrant, which they attempted to do. (see e.g. Tr. Ms. p. 187-8.) It was therefore the basis and the thrust of Mr. Andrus' testimony that although all that they

had were evidence of marijuana pipes being on the premises, that they wished an expansive search warrant to allow to search for all sorts of drugs and paraphernalia and other items in the belief that new drugs would be present to develop a case against the defendant. (See Mr. Andrus' testimony p.17 Tr. Ms. p. 176-192.) Further, it was Mr. Andrus' hope that if nothing else, the search and drugs would be leverage in a separate sex case, if they were to find any. (Tr. Ms. p. 184.)

Further, the search warrant attempted to authorize a search for "identification cards, records, accounts, etc.," although everyone knew that there was no evidence to justify or base any reason for that search, other than to explore for potential evidence. (Tr. Ms. p. 60-61.)

Based upon the affidavit presented, a search warrant was issued and a search was conducted of the defendant's home on May 20, 1988. The house was completely searched, as well as separate garage, where other controlled substances were allegedly found (e.g. Tr. Ms. p. 127.) Further, the searched lasted for approximately ten hours.

After an extensive hearing on defendant's motion to suppress held September 2, 1988, the District Court denied defendant's motion to suppress. (see Record p. 9) At the time of trial the evidence gathered from the search was admitted into evidence, and defendant was convicted of third degree felony, possession of a controlled substance, to-wit, marijuana, in that the jury found that the defendant did

possess just over one ounce of marijuana within one thousand feet of a public school. However, there was no evidence that there was anything other than possession in the defendant's home, which abutted a school. (Transcript herein in re certificate of probable cause p.4) It was on that basis, that there was merely simple possession near a school, as opposed to involving use in proximity of a school, which was the basis for issuing a certificate of probable case.

SUMMARY OF ARGUMENT

POINT I: THAT EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE

The affidavit in support of the search warrant on its face fails to demonstrate that there was probable cause that a crime had been committed and that there would be evidence of that crime in the defendant's residence. In addition, what evidence was in the affidavit was stale and of no further efficacy. In addition, the search warrant in issue was over broad and pretextural in connection with seeking of evidence of other crimes than that contained of in the affidavit.

POINT II: THAT A CONVICTION OF THE DEFENDANT FOR FELONY POSSESSION OF MARIJUANA IS AN UNREASONABLE AND UNCONSTITUTIONAL DEFINITION OF A CRIME

That defendant was convicted of possession of just over one ounce of marijuana, an ordinary class "A"

misdemeanor, however, based upon the possession occurring within one thousand feet of a school, the offense was a third degree felony. Such is unreasonable, arbitrary and a denial of the constitutional rights of a defendant. Further, said argument is further made because there was no evidence of any connection between the controlled substance and a school.

ARGUMENT

POINT I: THAT EVIDENCE OBTAIN PURSUANT TO THE SEARCH WARRANT WAS IMPROPERLY ADMITTED INTO EVIDENCE

The Utah Court of Appeals, in State vs. Miller, 740 P.2d 1363 (Utah 1987) discussed the requirements of issuing a search warrant. Illinois vs. Gates 103 S. Ct. 2317 (1983), the court stated, at page 1365: "

> " The task of the issuing magistrate is simply to practical, commonsense decision, whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a court is simply to ensure that the magistrate had a substantial basis for ... conclud[ing]' that probable cause existed."

The Utah Supreme Court in State vs. Hansen 732 P.2d 127 (Utah 1987), further elaborated on the requirements for the issuance of a search warrant. The court stated at page 130,

> "Search warrant affidavits are to be construed in a common-sense reasonable manner. State v. Williamson, 674 P.2d 132, 133 (Utah 1983); State v. Pursell, 586 P.2d 441 (Utah 1978). Excessive technical dissection of an informant's tip or of the nontechnical language in the officer's affidavit is ill-suited to this task (Illinois v. Gates) 462 U.S. at 231-32, 235-36, 103 S. Ct. at

> 2328-30, 2330-31. In Gates, the Supreme Court emphasized that an informant's 'reliability' and 'basis of knowledge' are but two relevant considerations, among others, in determining the existence of probable cause under 'a totality-of-the-circumstances.' 462 U.S. at 231-32, 235-36, 103 S. Ct. at 2328-30, 2330-31. They are not strict, independent requirements to be 'rigidly exacted' in every case. A weakness in one or other is not fatal to the warrant so long as in the totality there is substantial basis to find probable cause. Id. at 230, 238, 103 S. Ct. at 2328, 2332. The indicia of veracity, reliability, and basis of knowledge are no exclusive elements to be evaluated in reaching the practical, common-sense decision whether, given all the circumstances, there is a fair probability that the contraband will be found in the place described."

Although Gates adopted the totality of the circumstances test, rejecting the Aguilar-Spinelli two prong test, the two prong test may still need to followed. As stated in State v. Bailey, 675 P.2d 1203 (Utah 1984), a case decided after the rejection of the technical requirements of Aguilar-Spinelli, at page 1205:

> "However, even under this standard, compliance with the Aguilar-Spinelli guidelines may be necessary to make a sufficient basis for probable cause. Depending on the circumstances, a showing of the basis of knowledge and veracity or reliability of the person providing the information for a warrant may well be necessary to establish with a fair 'probability' that the evidence sought actually exists and can be found actually exists and can be found where the informant states."

In the affidavit in the case at bar, there is no indication that the defendant was currently committing a crime, or there would be evidence of that crime at his home. The affidavit merely stated that the informant had seen the defendant smoke marijuana three or four times in an unknown

location and that she had see various marijuana pipes lying around the house. There is no where stated in there the basis for that information and the source of that knowledge. Further, although in paragraph four the affiant stated that the girl was reliable, he was well aware of various psychological and other problems of Ms. Heber, and in addition, reasons for her to lie.(see Tr. Ms. at 54-57) Further, there was no reason to believe that there was any present likelihood of the same marijuana or the same pipes to be present. The claim in paragraphs five and six that people who smoke marijuana generally have evidence of drugs around their house, would clearly not be an appropriate factual basis to support any search warrant. Based upon that same argument, a warrant would have been proper two years ago to the home of Court of Appeals Judge Allen Ginsberg, based upon his having smoked marijuana at party ten years before. There is a requirement that there be probable cause existing at that time that a particular piece of contraband or evidence is present, not the likelihood that it has not been disposed of over a long period of time.

The related and flip side of this concern has to do with staleness, and the currency of the present information, which is an essential to the determination of probable cause. As stated in the United States vs. McCall, 740 F.2d 1333 (Fourth Circuit 1984) the Court stated at pages 1335-36:

> "The Fourth Amendment bars search warrants issued on less than probable cause, and there is no question that time is a crucial element of probable cause. A valid search

> warrant may issue only upon allegations of 'facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether proof meets this test must be determined by the circumstances of each case.' Consequently, evidence seized pursuant to a warrants afforded by 'stale' probable cause is not admissible in a criminal trial to establish the defendant's guilt.
>
> Cases in which staleness becomes an issue arise in two different context. First, the facts alleged in the warrant may have been sufficient to establish probable cause, when the warrant was issued, but the government's delay in executing the warrant possibly tainted the search. Second, the warrant itself may be suspect because the information upon which it rested was arguably to old to furnish 'present' probable cause. Reviewing the court's task in each category of cases is slightly different. In testing a warrant in the first category, it must decide whether a valid warrant became invalid due a lapse of time; when considering those in the second category, it must determine whether information sufficient to constitute probable cause was ever presented. The court's fundamental concern, however, is always the same: Did the facts alleged in the warrant furnish probable cause to believe, at the time the search was actually conducted, that evidence of criminal activity was located at the premises search?" (citations omitted)

The evidence presented in the affidavit is clearly stale. The most that can be said from the affidavit is that in a period one and one half years prior to the affidavit, that the defendant had been seen smoking marijuana three or four times. Further, the confidential informant had seen marijuana pipes in the defendant's house on a number of occasions, the exact number not known, although the last was at least two and one half months prior to the warrant. Thus, unless the Court excepts the proposition that once an individual has marijuana pipes in his home, that it would give

probable cause to believe that those same marijuana pipes would be present at any time, the information was too stale in this case to support the search.

It is also clear that the search warrant in this case was pretextural and the purpose was not as set forth in the affidavit. As testified to by Mark Andrus, Davis County Attorney, they were not seeking the same marijuana in the house as had supposedly been seen. (Tr. Ms. p. 189.) Further, they were seeking evidence of other drugs and other crimes rather than merely the marijuana or the marijuana pipes. (Tr. Ms. p.175-183, Chief Gardner's testimony Tr. Ms. p. 46.) Further, the search warrant sought to authorize a search for " identification cards, records, accounts, books, pictures, receipts, etc.," notwithstanding the fact that there was no probable cause or basis to believe that would be there based upon the statements of the confidential informant that there were marijuana pipes seen at the house. Therefore, it is clear that the search warrant was pretextural, the intended purpose of the search was for something other than that contained in the affidavit and search warrant. Further, the officers and the county attorney knew that they did not have sufficient basis for the other matters, but used the search warrant to search for other items. (see testimony of Lon Brian, Davis County Sheriff, Tr. Ms. at 89 and 110-112, Chief Gardner Tr. Ms. at p. 30, 46, 48-49, County Attorney, Andrus Tr. Ms. P. 175-84.) Therefore, said evidence was not properly seized pursuant to the search warrant, but went beyond it.

Therefore, since there was no probable cause in the search warrant, since any evidence and information was stale the Court should find that the evidence was improperly seized. In addition, based upon the pretextural nature of the search the overbreadth of the warrant, the lack of probable cause for the particulars of it, this Court should similarly rule that the search warrant was improper and invalid, and disallow any evidenced seized pursuant to it.

POINT II: THAT A CONVICTION OF THE DEFENDANT FOR FELONY POSSESSION OF MARIJUANA IS AN UNREASONABLE AND UNCONSTITUTIONAL DEFINITION OF A CRIME

Defendant was convicted of a third degree felony possession of marijuana because he was within the provision of the enhancement portion of the Controlled Substances Act, requiring that if possession is within one thousand feet of any school, it shall be third degree felony. It is submitted that without more, this violates the defendant's due process rights, especially in absence of evidence that there was any nexus or relationship between the possession of the marijuana and being within one thousand feet of a school.

As stated in Cardarella vs City of Overland Park 620 P.2d 1120 (Kansas 1980), at page 1127:

> "A guarantee of due process demands only that the statute shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained. Nebbia v. New York 291 U.S. 502, 54 S. Ct. 505, 78 L. Ed 940 (1934.)

The Utah Supreme Court has also recognized that arbitrary classification of crimes may be unconstitutional. See e.g. State v. Clark 632 P.2d 841 (Utah 1981) at 843.

It is submitted that it is arbitrary, capricious and unreasonable to elevate a class "A" misdemeanor possession of marijuana to a third degree felony merely because it is in within one thousand feet of a school without more. If the statute were to require or if the evidence herein showed that there was some relationship between the possession and the school- such as a sharing with the young students of that school or attempted sales or anything else, there may be a reason. But merely based upon the fortuitous fact that the defendant's home was within one thousand feet of school does not present a rationale basis to elevate this crime to a felony. There is no reason to elevate the crime in the absence of some further nexus or connection. Physical location is not sufficient.

It also raises great concerns with regard to unreasonable and unbridled discretion of the prosecutor to charge. If you have a situation where an individual possessed some marijuana in a car, if he travels within one thousand feet of a school, it could be a felony, although the prosecutor would not charge it as a felony. Further, it may be difficult are in various parts of the State of Utah to find places that greater than one thousand feet of school so that an intelligent criminal could merely be guilty of a misdemeanor, as opposed to a felony. However, the discretion

is too great, the basis for the elevation to tenuous to sustain or justify and it is improper to grant so much discretion to a prosecutor in the choice of the charge. See e.g. State vs. Bryant 709 P2d 257 (Utah 1985) Therefore, there is no rational basis for the elevation of the alleged misdemeanor to a felony in the particulars of this case, nor on the face of the statute. Thus, the classification if arbitrary, capricious and lacking in rational basis, and cannot be sustained.

CONCLUSION

It is respectfully submitted that the evidence obtained pursuant to the search warrant in the present case was improperly admitted into evidence, upon the basis that there was no probable cause for the issuance of the warrant, that the warrant was over broad on its face and as applied, based upon stale information and pretextural in nature of its execution. Therefore, this Court should reverse the admission of that evidence and remand the matter for a new trial. Further, the conviction of the defendant for a felony constitutes a denial of his constitutional rights to due process of law, in that the exacerbation of the statute from a

misdemeanor to a felony is arbitrary, capricious and unreasonable. Therefore, in reversing and remanding, this Court should direct that in absence of further nexus between the school and the possession, a felony conviction cannot be obtained.

DATED this ____dayof _____, 1989

_____
THOM D. ROBERTS
Attorney for Defendant/
Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on the ____day of March, 1989, four copies of the foregoing Appellant's Brief were delivered to Paul Van Dam, Attorney General, 236 State Capitol Building, Salt Lake City, Utah.

_____
Secretary